95-1685

Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MELKA MARINE, INC.,
Petitioner,

versus

TOWN OF COLONIAL BEACH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Were the due process rights of Melka Marine, Inc. violated by the award of sanctions in the sum of $30,000.00 against Melka Marine, Inc.?

2. Is Melka Marine, Inc. entitled to recover its attorney's fees pursuant to the contract?

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OPINION BELOW

The opinion of the Supreme Court of Virginia from which petitioner[1] seeks certiorari

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1. The caption of the case contains the names of all the parties. Melka Marine, Inc. is not a subsidiary or affiliate of any company.

appears in the Appendix hereto at page A-1. The subsequent Order issued by the Supreme Court of Virginia denying the petitioner's petition for rehearing appears in the Appendix hereto at page A-26. The Judgment Order together with the attached letter opinion of the trial court also appears in the Appendix hereto at page A-3.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on November 17, 1995. A timely petition for rehearing was filed on December 1, 1995; an Order denying the petition for rehearing was entered on January 19, 1996. This petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(a).

STATEMENT OF THE CASE

This petition for writ of certiorari arises from a construction contract entered into between the parties on January 19, 1993, in Fairfax

County, Virginia in the sum of $254,406.00. Said contract was modified through an addendum dated January 21, 1993. Said contract required Melka to furnish and place 14,000 cubic yards of sand at the Town's beach in accordance with the contract requirements. The Department of the Army has agreed to pay the Town one-half the contract sum. Melka completed all work required by the contract in August 1993.

After the Town refused to pay Melka for the work performed in accordance with the contract, Melka Marine filed a motion for judgment on November 17, 1993. A jury trial was held on April 13 and 17, 1995. The issues presented to the jury were whether Melka was entitled to the contract balance and its attorney's fees and also whether Melka was liable for the Town's counterclaims. The jury awarded the entire contract balance of $64,755.50 to Melka in addition to attorney's fees of $20,000.00 pursuant to the contract. The jury also found that Melka Marine, Inc. was not liable for any of the various counterclaims asserted by the Town. The trial court entered a Judgment Order on June 23,

1995, which took away the attorney's fees awarded by the jury and assessed sanction in the sum of $30,000.00 against the undersigned counsel and Melka. Melka timely filed its Notice of Appeal of certain issues on July 19, 1995. The Town filed a Notice of Appeal on July 21, 1995, and then by letter dated August 16, 1995, stated that the Town was not pursuing its appeal.. The Supreme Court of Virginia refused to even hear Melka's appeal on the ground that Melka filed a notice of the filing of the filing of the transcript a few days late. Melka timely filed the transcript; however, Melka did not file the notice of filing of the same in strict compliance with Rule 5:11(b) of the Rules of the Virginia Supreme Court. See the Petition for an Extraordinary Writ filed herewith by Melka Marine, Inc. for a further discussion of this matter.

As Melka stated on page 11 of its Petition for Appeal of Melka Marine, Inc. filed with the Supreme Court of Virginia:

> "On Saturday, May 6, 1995, nineteen days after the jury had rendered its verdict, the Town served its second motion for sanctions

against Melka Marine, Inc. and the undersigned Melka's counsel. (Vol. V, p. 926-930) **Over Melka's objection of lack of due process** (Page 31 of Post Trial Transcript), the trial court heard the Town's said second motion for sanctions on the following Thursday, May 11, 1995. No notice of a time and place for the hearing of said Town's second motion for sanctions was served with the second motion for sanctions. The trial court and the Town have failed to provide any breakdown whatsoever for the $30,000.00 the Town states it has incurred in legal fees; accordingly, it is difficult if not impossible to ascertain what legal fees were expended for the matters the Town raises in its second motion for sanctions. The Town should at least have been required to provide a breakdown of the legal fees including the hours expended, with dates and the hourly rate, for said fees before the trial court awarded $30,000.00 in sanctions against Melka Marine, Inc. **Due process requires no less."** (Emphasis added.)

In addition, in a memorandum filed with the trial court dated May 18, 1995, Melka Marine stated that:

"The defendant could have resolved the payment of the original contract balance back in August 1993, by just paying the plaintiff, Melka Marine, Inc., said original contract balance; instead, the defendant decided to utilizes the route this Court is now familiar with in this matter. On Saturday, May 6, 1995, nineteen days after the had jury had rendered its verdict, defendant served its second motion for sanctions against the plaintiff and the undersigned plaintiff's counsel. No notice of [a date for hearing of] said defendant's second motion for sanctions was served with the same. The defendant has failed to provide any breakdown whatsoever for the $30,000.00 the defendant states defendant has incurred in legal fees; accordingly, it is difficult if not impossible to ascertain what legal fees were expended for the matters the defendant raises in said defendant's second motion for sanctions. The defendant should at least be required to provide a break down of the legal fees including the hours expended with dates and the hourly rate for said fees before this Court makes an award of sanctions. **Due process requires no less**. Thereafter, on May 11, 1995, over the objection of the plaintiff, Melka Marine, Inc., **on the basis of lack of**

due process, this court heard defendant's arguments in support of defendant's second motion for sanctions." (Emphasis added.)

Melka Marine also stated in a hearing before the trial court on May 11, 1995, in part that:

"As I stated earlier, **I object under due process requirements** that I just received this Motion of Sanctions for $30,000 last Saturday. I do request more time to respond to it. . .

". . . You just don't go back in hindsight and say give it a broad brush and say he's liable for sanctions because he did all this. You've got to pick out a document and then say why sanctions should be applied.

"I object to the form of the motion in that it's broad brush. It's hard to put me on notice as to which particular document they're raising. I think that's an improper way to make a motion for sanctions." (Emphasis added.) Pages 31, 34-35 of transcript of May 11, 1995.

The Fifth Amendment of the United States Constitution states in pertinent part that:

> "No person shall be . . . deprived of . . . property, without due process of law. . . ."

The Fourteenth Amendment of the United States Constitution states in pertinent part that:

> ". . . No State shall . . . deprive any person of . . . property without due process of law . . . ."

Furthermore, Melka Marine, Inc. contends that the trial court's award of sanctions is based upon conclusions that are overly broad and lack the specificity required for an award of sanctions in the sum of $30,000.00.

By way of background, the Town failed to properly respond to discovery, interfered with the taking of a deposition by kicking a witness under the table, moved to disqualify Melka's undersigned attorney, took the deposition of Melka's attorney, filed various counterclaims and amended counterclaims, stated various legal positions and then abandoned the same, moved to extend the trial date, continued to insist that it was going to call Melka's undersigned attorney as

a witness right up until two days before trial and filed motions for sanctions.

Mike Doherty, Melka Marine, Inc.'s legal fee expert, was accepted as an expert witness on the subject of legal fees. Mr. Doherty testified that the tactics of the Town increased the cost of this litigation.. Mr. Doherty testified that the legal fees charged to Melka Marine, Inc. were "reasonable and well within the limits for this type of case". Mr. Doherty also testified that the Town was liable for Melka Marine, Inc.'s legal fees for defending the Town's counterclaims. Melka Marine, Inc. was required to defend multiple counterclaims from the Town. The Town's counterclaim dated March 2, 1994, despite the clear language of the contract requiring 14,000 cubic yards, took the position that the contract required 14,780 yards; the Town further claimed in the first paragraph number 6 of said counterclaim that Melka Marine, Inc., was in default and that the Town "instructed Melka to leave the project site"; the Town further claimed in the second paragraph number 6 of said counterclaim that Melka Marine, Inc. failed to

complete the work required by the contract and was therefore in breach of the contract. The Town then demanded in said counterclaim damages against Melka Marine, Inc. in the sum of $150,000.00 plus its attorney's fees. In the Town's amended counterclaim filed September 15, 1994, the Town made additional claims for deceit, claiming that even though the contract clearly stated 14,000 cubic yards of sand, Melka Marine, Inc. deceived the Town by not telling the Town that Melka Marine, Inc. was only required to furnish and place 14,000 cubic yards of sand. The Town then demanded another $250,000.00 in damages including punitive damages in addition to attorney's fees in said amended counterclaim for a total of $400,000.00 in counterclaims plus attorney's fees.

The motion for judgment was filed on November 17, 1993, in the Circuit Court of Fairfax County. In December 1993, the Town was served with discovery that the Town failed to respond to within the required twenty-one days after service. There were numerous motions filed prior to the trial; however, prior to Melka Marine,

Inc. filing any discovery motions with the trial court, Melka Marine, Inc. attempted to resolve the failure of the Town to answer the outstanding discovery through an informal agreement with the counsel for the Town. On January 14, 1994, at the courthouse in Fairfax, counsel for the Town stated that the Town would answer Melka's outstanding interrogatories and request for documents within two weeks. Thereafter, when the Town failed to honor its commitment to answer said discovery, Melka Marine, Inc. served motions to compel said discovery on February 3, 1994. Melka Marine, Inc. also served a motion for summary judgment based upon the failure of the Town to answer Melka's first set of requests for admission within the required twenty-one days of service. On February 7, 1994, Melka Marine, Inc. served Plaintiff's Motion for Judgment on Affidavit and Statement of Account as a result of the Town's failure to answer the motion for judgment under oath pursuant to Section 8.01-28 (judgment on contract and affidavit) of the Code of Virginia. On February 17, 1994, Melka Marine, Inc. served Plaintiff's Motion to Vacate Order

because Melka Marine, Inc. did not receive notice of the time and place of presentment of the subject order. Furthermore, even after Melka Marine, Inc. advised the Town and the trial court of the failure to provide notice of the time and place of presentment of orders, the Town and the trial court continued to enter orders without notice and without the endorsement of counsel for Melka Marine, Inc.

Moreover, during the deposition of Mr. Tsompanas, a third-party witness, on March 10, 1994, the transcript reflects:

> "MR. MITRANO: I ask that counsel for the defendant not kick the witness while he's testifying, as I just observed.
>
> "MR. SAUNDERS: You know, he answered your question.
>
> "MR. MITRANO: But I would ask that counsel for defendant not kick the witness while he's testifying.
>
> "MR. SAUNDERS: He was finished.
>
> "MR. MITRANO: But I do ask that counsel --

"MR. SAUNDERS: Very Well. Go ahead. Do you have another question? It's 5 o'clock. I hear you. Do you have another?

"MR. MITRANO: I would ask you refrain from kicking the witness.

"Mr. SAUNDERS: I'11 try to honor your request."

Thereafter, during the hearing of the motion on August 17, 1994, concerning the Town's attorney kicking a witness during a deposition, the Town' s attorney denied that he kicked the witness:

"THE COURT: I wouldn't believe this if see it. Kicking a witness while testifying?

"THE COURT: Catch you in the act?

"MR. SAUNDERS: Your Honor, I didn't kick anybody . . .

"Mr. SAUNDERS: I will tell you the honest to goodness facts ... Mr. Tsompanas had answered the pending question and he started off into a soliloquy, and with my heel firmly planted in the carpet, I rotated my foot and gently tapped his shoe, and I should not have done that. . .

> "MR. MITRANO: Well, I think it's quite serious.
>
> "THE COURT: Is it really? I mean, come on here. You're losing some credibility when you come up with this sort of thing with me, frankly.
>
> "MR. MITRANO: I'm concerned. . I don't want to get into whether it was just a tap or a kick, but I don't believe Defendant's Counsel should be having that type of contact. . .
>
> "THE COURT: I don't have time to deal with this sort of thing, not with a reputable lawyer. I just don't."

During the trial on April 17, 1995, the trial court referred to said kicking as a "silly issue".

ARGUMENT

1. Were the due process rights of Melka Marine, Inc. violated by the award of sanctions in the sum of $30,000.00 against Melka Marine. Inc.?

On July 1, 1987, Section 8.01-271.1 of the Code of Virginia became effective. In *Oxenham v. Johnson*, 241 Va. 281, 287, 402 S.E.2d 1 (1991),

the Supreme Court of Virginia stated that an abuse-of-discretion standard is applied with respect to the award or denial of sanctions.

The trial court failed to cite any case law whatsoever in its ruling that $30,000.00 in sanctions should be awarded against Melka. The issue before the trial court was the failure of the Town to pay Melka Marine, Inc. pursuant to the terms of the contract. The Town has caused Melka Marine, Inc. to incur enormous expenses in seeking to collect the money that the Town owed Melka. The contract in question clearly states that the Town was responsible for payment of at least the sums that the jury found due Melka Marine, Inc.

In partial support of the trial court's award of sanctions, the trial court cites two motions to compel that Melka filed on February 4, 1994. Melka did file a motion for order compelling the Town to answer interrogatories on February 4, 1994. Melka states that this motion was justly based in law and fact because the Town had failed to respond to Melka's interrogatories that were served on December 23, 1994. Clearly,

Melka is not required to waive its right to have the Town respond to its interrogatories in order to avoid the award of $30,000.00 in sanctions against Melka. Melka did file a motion for order compelling the Town to respond to its request for production of documents on February 4, 1994. Melka states that this motion was justly based in law and fact because the Town had failed to respond to Melka's request for production of documents served on the Town on December 23, 1994. Clearly, Melka is not required to waive its right to have the Town respond to its request for production of documents in order to avoid the award of $30,000.00 in sanctions against Melka Marine, Inc. Melka did file a motion for summary judgment based upon the requests for admission that the Town had failed to deny on February 4, 1994. Melka states that this motion was justly based in law and fact because the Town had failed to respond to Melka's requests for admission served on the Town on December 21, 1994. Clearly, Melka is not required to waive its right to have the Town respond to its requests for admission in order to avoid the award of

$30,000.00 in sanctions against Melka. See *Davis v. Noufal*, 142 F.R.D 258, 259-60 (D.C. 1992) for the position that a motion for summary judgment based upon unanswered requests for admission has the same effect as a motion to compel answers to the requests for admission. Moreover, prior to filing the above-stated motions on February 4, 1994, Melka had informally agreed not to file motions to compel for two weeks from January 14, 1994, because the Town had represented to Melka that the Town would respond to said outstanding discovery within two weeks from January 14, 1994. Melka confirmed said understanding by letter as follows:

> "This letter is to confirm that on January 14, 1994, you advised the undersigned that you would provide answers to the outstanding [discovery], in two weeks from January 14, 1994. In exchange for your cooperation in responding to the outstanding discovery, I agreed that I would not file a Motion to Compel for two weeks from January 14, 1994."

Despite the representation of the Town that the Town would provide answers to the outstanding

discovery within two weeks from January 14, 1994, the Town failed to provide answers to said outstanding discovery within two weeks from January 14, 1994. Clearly, Melka should not be assessed sanctions in the sum of $30,000.00 for attempting to obtain answers to its discovery after the time for responding had already elapsed by January 14, 1994, and further after Melka had agreed to wait two additional weeks based upon the incorrect representation that the Town would provide said answers within said two weeks.

On February 8, 1994, Melka filed its Motion for Judgment on Affidavit and Statement of Account because the Town had failed to plead its grounds of defense under oath in accordance with Section 8.01-28 of the Code of Virginia. Furthermore, Rule 1:10 of the Rules of Virginia Supreme Court requires any objection for not pleading under oath to be made within seven days; Melka would have waived its right to require the Town to plead under oath if Melka had failed to promptly file said Motion for Judgment on Affidavit and Statement of Account. Clearly, Melka is not required to waive its right to have a

pleading under oath in order to avoid the award of $30,000.00 in sanctions against Melka.

The trial court next cites that on "February 14, he moved for reconsideration of the order changing venue" in support of the trial court's award of $30,000.00 in sanctions against Melka. Contrary to the trial court's statement that Melka moved for a change of venue on February 14, 1994, Melka's Motion for Reconsideration of Defendant's Motion for Change of Venue was filed on January 25, 1994, in the Circuit Court of Fairfax County then ruled upon by the Circuit Court of Fairfax County, then filed at the Circuit Court of Westmoreland County on February 14, 1994. The Circuit Court of Westmoreland County did not rule upon Melka's Motion for Reconsideration of Defendant's Motion for Change of Venue; said motion was ruled upon by the Circuit Court of Fairfax County. Clearly, Melka should not be assessed sanctions in the sum of $30,000.00 for filing Melka's Motion for Reconsideration of Defendant's Motion for Change of Venue.

The trial court also cites Melka's motion to vacate order as further support for the sanction award of $30,000.00. When the trial court entered the order on February 10, 1994 without the required notice and without the endorsement of Melka's attorney, said order was void. Rule 1:13 of the Rules of Virginia Supreme Court clearly requires that drafts of Orders shall either be endorsed by Melka's counsel or that reasonable notice of the time and place of presentment be provided to Melka's counsel. An order that is entered that does not comply with Rule 1:13 is void. *Rosillo v. Winters*, 235 Va. 268, 272, 367 S. E.2d 717 (1988) citing *Cofer v. Cofer*, 205 Va. 834, 836, 140 S.E.2d 663, 665 (1965); *Westerberg v. Westerberg*, 9 Va. App. 248, 250, 386 S. E. 2d 115 (1989) also citing Cofer v. Cofer, supra. Clearly, Melka should not be assessed sanction in the sum of $30,000.00 because Melka advised the trial court that the trial court had entered a void order.

Next, the trial court cites the motion related to the Town's attorney kicking a witness during a deposition. The trial court condoned the

Town's attorney kicking a witness under the table during a deposition. In *Forman v. Mount Sinai Medical Center,* 128 F.R.D. 591, 593 (S.D.N.Y. 1989), the court reprimanded counsel for signaling to a witness. Clearly, Melka should not be assessed sanctions in the sum of $30,000.00 when the Town's attorney kicked a witness under the table during a deposition.

The next basis cited by the trial court as justifying an award of $30,000.00 in sanctions is that Melka made a settlement offer to the Town. Settlement discussions are not subject to a violation of Section 8.01-271.1 of the Code of Virginia. *Insurance Co. of North America v. J.S. Vig Const. Co.,* 141 F.R.D. 56, 57-58 (E.D.Mich. 1992). Furthermore, Section 8.01-271.1 of the Code of Virginia does not apply to papers not filed with the court. *Jones v. International Riding Helmets, Ltd.,* 145 F.R.D. 120, 122 (N.D.Ga. 1992). Hence, any allegations of the respondent that said Section 8.01-271.1 applies to settlement offers, including the letter from the undersigned counsel to respondent's counsel dated February 16, 1995, which respondent's counsel later

forwarded to this Court with the request that said letter dated February 16, 1995, be included in the respondent's then pending motion for sanctions of November 7, 1994, is without merit.

The Supreme Court of Virginia noted the similarity between said Section 8.01-271.1 and Rule 11 of the Federal Rules of Civil Procedure in *Oxenham v. Johnson*, 241 Va. 281, 402 S.E.2d 1 (1991) and cited case law from the United States Court of Appeals for the Seventh and Eleventh Circuits stating:

> "Rule 11 of the Federal Rules of Civil Procedure and Code 8.01-271.1 are similar in the respects material here." Id., at 286.

In *Southmark Inv. Group 86, Inc. v. Turner Development Corp.*, 140 F.R.D. 1 (M.D.Fla. 1991), the court stated:

> ". . . The substantive nature of this dispute is not before this Court. Defendant has failed to show that any specific portion of the Plaintiff's complaint, motions or other pleadings was not well grounded in law or fact. This is the objective test required by Rule 11, as noted in Hashemi v. Campaingner Publications, Inc., 784 F.2d 1581, 1583 (11th Cir. 1986). Vague allegations of bad faith do not

justify the imposition of sanctions... ." *Id.*, at 3.

". . .The inflammatory Memorandum filed by Defendants prompts this Court to warn Defendants that "we look with disfavor on a party's use of Rule 11 or the ethical rules as combative tools. The rules governing the ethical conduct of lawyers are far too important to be trivialized and used in baseless mudslinging. Autrey v. United States, 889 F.2d 973, 986 (11th Cir. 1989). Despite the 'chagrin and sadness' with which Defendants filed the motion, it comes perilously close itself to being a sanctionable pleading under Rule 11 in that it is wholly unsupported by the facts or the law. "

The trial court failed explain why any document filed by Melka is a violation of said Section 8.01-271.1. In *Curley v. Brignoli Curley & Roberts Associates*, 128 F.R.D. 613, 616 (S.D.N.Y. 1989), the Court stated:

". .. Therefore, the rule applies only to pleadings, motions or other papers and not to 'the entire conduct of the proceedings.' Oliveri

v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); see also Levine v. Arabian American Oil Co., 664 F.Supp. 733, 735-36 (S.D.N.Y. 1987) (Carter, J.) ('Under Oliveri, [movant] may not complain of the cumulative effect of plaintiff's counsel's conduct, but only of specific pleadings, motions or other papers which fall short of the standards established by the rule.')"

"While the term 'other papers' is somewhat ambiguous, courts have interpreted it to refer only to papers served or filed with the court. See 5 Wright, Miller & Kane, Federal Practice and Procedure 221 (1989 Supplement). The contention by Brick and Bennett that Rule 11 should apply to any paper sent to the court, such as a letter, is not supportable. (Footnote omitted.) While 'other papers' does literally include discovery papers, they are more properly governed by the provisions of Fed.R.Civ.P. 26(g). See Advisory Committees's Notes on 1983 Amendment to Fed.R.Civ.P. 11 (quoted in 5 Wright, Miller & Kane (1989 Supp.) at 220)."

It is important to note that Rule 4:1(g) of the Rule of Virginia Supreme Court applies to discovery

requests and objections and that said Section 8.01-271.1 Code of Virginia does not apply to discovery requests and objections. The trial court's reference to the number of discovery requests is also misplaced. Although Melka did serve three sets of interrogatories, the actual number of interrogatories was twenty-three which is well below the limit of thirty stated in Rule 4:8(g) of the Rules of Virginia Supreme Court. Also see *Al-Jundi v. Rockefeller*, 91 F.R.D. 590, 592-93 (N.Y. 1981) for the number of requests of admission utilized in other cases.

Also see *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 555 (N. D. Cal. 1987) wherein the court stated: "Rule 11. . . cannot be used to preempt the application of Rule 26(g) to discovery responses and requests." See also *Quadrozzi v. City of New York*, 127 F.R.D. 63, 80 (S.D.N.Y. 1989), wherein the Court stated:

> "In considering Rule 11 sanctions, a court cannot use hindsight and instead must base its award on specific instances of misconduct, resolving all doubts in favor of the signer. Oliveri, 803 F.2d at 1275. In

> an action such as the present one--where plaintiffs' alleged misconduct spans one year, implicates three statutory bases and includes at least 12 separate instances of potentially sanctionable conduct--one is tempted to consider only whether the cumulative effect of plaintiffs' conduct warrants sanctions. Nevertheless, under Rule 11, courts should not take a broad brush approach to sanctions. (citations omitted) . . . Thus, courts may not look to the cumulative effect of several signings to infer bad faith from a pattern of abuse. . . ."

Likewise, any allegations of the Town that said Section 8.01-271.1 applies to discovery papers, including interrogatories, requests for document and/or requests for admission, are also without merit.

In summary, as this Supreme Court of the United States stated in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 111 S.Ct. 2123, 2135, 115 L.Ed.2d 27 (1991) courts "must comply with the mandates of due process . . . in assessing fees."

2. Is Melka Marine, Inc. entitled to recover its attorney's fees pursuant to the contract?

Paragraph Number 14 of the contract between the parties states:

> "14. The owner [Town] agrees to pay all collection expenses including legal fees associated with the collection of monies on the contract that MMI [Melka Marine] incurs as a result of any failure of the owner to make payment(s) in accordance with this agreement."

Melka Marine respectfully request that this Court address this issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Supreme Court of Virginia.

Respectfully submitted,

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April 16, 1996